Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
The Regional Sports Network Marketplace	)	MB Docket No. 11-128
	)	

COMMENTS OF HAWAIIAN TELCOM SERVICES COMPANY, INC.

Hawaiian Telcom Services Company, Inc. ("HTSC") hereby submits its comments in response to the Public Notice issued in the above-captioned proceeding.[1] Among other things, the Commission requests comments concerning the state of the marketplace with respect to regional sports networks ("RSNs") and the important role such programming plays in promoting competition for video services. The *Adelphia Order* merger conditions are essential to promoting such competition. Therefore, the Commission should ensure going forward that it has regulations or precedent in place that gives non-dominant multichannel video programming distributors ("MVPDs") access to cable TV-affiliated RSNs on rates, terms, and conditions that are reasonable and which preserve competition in the marketplace.

I. HTSC IS A NASCENT VIDEO COMPETITOR THAT NEEDS ACCESS TO REGIONAL SPORTS NETWORKS TO BE COMPETITIVE.

HTSC is a new entrant into the video marketplace, having become a MVPD when it received a franchise from the Hawaii Department of Commerce and Consumer Affairs

[1] Public Notice, *The Regional Sports Network Marketplace*, MB Docket No. 11-128, 76 Fed. Reg. 46295 (Aug. 2, 2011) ("Public Notice").

in June 2011. HTSC is authorized to provide IPTV-based video services to customers on the Island of Oahu. HTSC faces the dominant Time Warner Cable through its division Oceanic Time Warner Cable, which provides MVPD service to approximately 94 percent of the households on Oahu and over 90 percent of the households in the State of Hawaii. Time Warner Cable is the second largest cable TV operator in the United States.[2] The FCC itself has recognized that MVPD competition is particularly hampered in Hawaii because satellite dish MVPDs have lower penetration rate in Hawaii than in other areas of the country due to a variety of unique market factors.[3]

HTSC has been actively making arrangements with programmers to include customer-desired programming in its channel lineup and is moving ahead with its marketing efforts. HTSC has obtained programming with market-based rates, terms, and conditions from virtually all major programmers, such as HBO, Showtime, USA Network, and TNT Entertainment. In addition to that programming, one of the critical, "must see" offerings that a successful MVPD on Oahu must make is the ability to air University of Hawaii ("UH") sports programming due to the unique nature of the sports environment in Hawaii.

The UH in 2008 awarded Time Warner Cable the contract to air all UH sports programming, including football and basketball games. Included in the six-year contract was a three-year arrangement that allowed an over-the-air TV broadcaster, KFVE, to retain broadcast rights to all UH events. That three-year arrangement has ended. Thus,

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[2] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming (Thirteenth Annual Report),* MB Docket No. 06-189, 24 FCC Rcd 542, ¶ 31, Table 2 (2009) ("*Thirteenth Annual Video Competition Report*").

[3] *Id.*, ¶¶ 257-60.

starting with this 2011-2012 school year, Time Warner Cable will be the only source for UH sports programming, and HTSC no longer will have access to such programming through retransmission consent rights under the FCC's rules.

The sports environment in Hawaii is unique in that there are no major league teams of any sport that are based in Hawaii, and the nearest major league team is on the U.S. mainland approximately 2,500 miles away. As a result, the sports which command MVPD customer attention and loyalty in Hawaii are sports teams from the UH, an NCAA Division I school. Not only are football, and men's and women's basketball games popular, but there is also an intense viewer interest in Hawaii for other UH sports, such as volleyball, softball, baseball, and soccer. Volleyball matches have been known to sell out the 10,000-seat Stan Sheriff Center (the women's team regularly leads the nation in women's volleyball attendance), with many more watching on television.[4] This rate of attendance is almost unheard of outside of Olympic competitions. UH sports are literally the talk of the town and at the water cooler in Hawaii.[5] The movement of much of this programming from an over-the-air-broadcast TV station, to Time Warner Cable's cable TV system, the dominant MVPD in Hawaii, poses grave competitive risks to the video marketplace in Hawaii.

[4] The availability of UH sports programming is critical to viewers. *See, e.g.,* http://www.staradvertiser.com/news/20110301_Free_TV_viewing_dims_in_cables_UH_sports_deal.html.

[5] *See* http://www.hawaiinewsnow.com/story/15288224/oceanic-time-warner-cable-announces-launch-of-ocsports-featuring-live-university-of-hawaii-sports?re directed=true ("Hawaiian News Now Article").

Recently, Time Warner Cable has entered into contracts with HTSC that permit HTSC to offer UH sports programming from Time Warner Cable's RSN in Hawaii.[6] HTSC applauds Time Warner Cable's willingness to enter into these arrangements. Notwithstanding this success, HTSC firmly believes that the *Adelphia Merger* conditions were more than any other factor the encouragement that Time Warner Cable needed to enter into the RSN contracts with HTSC. UH sports programming is "must see" programming that has to be part of an MVPD's channel line-up in order to attract customers. Without such "must see" programming, HTSC is critically hobbled as a competitor, creating a serious risk that the existing monopoly will remain in place forever.

II. THE COMMISSION SHOULD ENSURE THAT REGIONAL SPORTS NETWORKS AFFILIATED WITH DOMINANT CABLE TV PROVIDERS ARE MADE AVAILABLE TO COMPETITORS ON REASONABLE TERMS AND CONDITIONS.

Although Congress opened up the video marketplace to competition in 1992, competition has been slow to come to the American consumer. As a result, video customers have not been able to enjoy the pricing and innovation benefits that are associated with competition, as have telecommunications customers. This lack of video competition is now only beginning to change, although dominant cable TV providers are

[6] Time Warner completed its arrangements after HTSC sent a demand letter to gain access to the entire RSN programming, indicating that it may file a formal complaint at the FCC if Time Warner Cable refused it such access. Letter from Gregory J. Vogt, Counsel, HTSC, to Marlene H. Deutsch, Secretary, FCC, MB Docket No. 07-198, *et al.* (Aug. 2, 2011). HTSC argued that all UH programming was part of a single RSN either under the program access rules or under the *Adelphia Order* merger conditions. *Id*. at 2. *See Applications for Consent to the Assignment and/or Transfer of Control of Licenses Adelphia Communications Corporation (and Subsidiaries, Debtors-In-Possession), Assignors, to Time Warner Cable Inc. (Subsidiaries), Assignees, et al.,* MB Docket No. 05-192, 21 FCC Rcd 8203, Appendix B, § B.1 (2006) ("*Adelphia Order Merger Conditions*").

working hard to undermine that competition. The FCC should fulfill the congressional mandate to promote video competition[7] by ensuring that the above-described provisions can continue to be enjoyed by new entrant MVPDs.

The *Adelphia Order* merger conditions provide effective, although incomplete, rights to non-dominant MVPDs by permitting access to RSNs they critically need in order to compete with the dominant cable TV operator. Without the protection provided in the *Adelphia Order* merger conditions, HTSC has serious concerns that in the future cable TV operators, such as Time Warner Cable, or an affiliated RSN, would engage in unfair practices that would effectively exclude HTSC from the video marketplace by denying access to regional sports programming. The *Adelphia Order* provides substantial protection because it gives an MVPD the absolute right to access RSNs, without further proof of harm, and to gain access to the RSNs upon nondiscriminatory terms and conditions.[8] With the expiration of the *Adelphia Order* merger conditions, these substantial protections will disappear.

HTSC recognizes that the FCC's program access rules provide some additional protection to MVPDs by permitting them to prove that a cable TV-affiliated programmer's denial of access to programming, including sports programming, is unreasonable and thus in violation of Section 628(b) of the Communications Act.[9] In the *Terrestrial Program Access Order*, the FCC established a rebuttable presumption that an MVPD should be able to obtain access upon reasonable rates, terms, and conditions, to

[7] *See, e.g.*, 47 U.S.C. § 548(a).

[8] *Adelphia Order Merger Conditions,* § B.1.

[9] 47 U.S.C. § 548(b).

RSN programming.[10] The Commission went on to hold that even in the case of programming that does not fall within the definition of an RSN, an MVPD would still be able to file a complaint or arbitration action seeking access to programming, provided that it can meet the burden of proof in demonstrating the anticompetitive purpose or effect of such programming denial.[11] Although these rules are beneficial, they are not as effective as the *Adelphia Order* merger conditions because the program access rules do not give MVPDs the absolute right to such programming.[12] Because the program access rules require that burdensome proof be presented, they substantially increase the costs to obtain programming at a time when the MVPD is already disadvantaged as the non-dominant player in the video market. There are four areas where FCC regulations could help to protect MVPD competition in the future by ensuring access to cable TV operator-affiliated RSNs.

First, the program access rules (as well as the *Adelphi Order* merger conditions) are unclear as to what is included in the definition of the term "RSN".[13] Cable TV-affiliated RSN programmers should not be able to restrict their offerings to only specific sports, such as NCAA Division I football and basketball, in the RSN, even though the cable TV company markets a package of the RSN's local sports to its subscribers on one

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[10] *Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, 25 FCC Rcd 746 (2010), *aff'd in part and rev'd in part, Cablevision Systems Corp. v. FCC*, No. 10-1062, 2011 U.S. App. LEXIS 11697. ¶ 52 (D.C. Cir., Jun. 10, 2011) ("*Terrestrial Program Access Order*").

[11] *Id.*, ¶¶ 50-51.

[12] Although the FCC recognized that the *Terrestrial Program Access Order* does not alter the *Adelphia Order* merger conditions, *id.*, ¶ 69, the merger conditions will expire by their terms in 2012. *Adelphia Order Merger Conditions*, § B.1.d.

[13] See, e.g., *Terrestrial Program Access Order*, ¶ 53.

or more channels.[14] The FCC should clarify its rules to ensure that the definition of an RSN includes all regional sports programming of a cable TV provider-affiliated RSN that includes a covered sport.

Second, RSNs affiliated with the dominant cable TV operator should not be required to pay the full retail rates for the licensing rights to the RSN's programming. Typically, cable TV providers receive wholesale rates for their affiliate's RSN programming. HTSC is aware that most sports pay-per-view programmers (e.g., ESPN, MLB, and NBA) typically charge wholesale rates to their affiliates, as well as to independent MVPDs. Not providing the same wholesale rates to the new entrant MVPD would be discriminatory and produces an unreasonable and unfair impact on competition in the video marketplace. Non-dominant MVPDs, especially new entrants, should be permitted access to cable TV operator-affiliated RSNs under "wholesale" rates in a nondiscriminatory manner.

Third, MVPDs should be able to obtain standard ad insertion rights from a cable TV-affiliated RSN. RSNs, as well as other programmers, typically grant to their cable TV affiliates two minutes each hour, across their entire schedule, with the right to air self-promotion ads or to sell ad time to local advertisers. Denial of these typical ad-insertion rights effectively gives the cable TV operator a much greater opportunity for it to generate local ad revenues or to air self-promotional ads directed at the MVPD's video customers.

[14] It should not matter whether the cable TV operator markets these RSN games to its subscribers at different pricing points based on a single game, a single sport, or a group of sports, especially when they are marketed to consumers as part of the same offering. *See, e.g.*, http://www.khon2.com/sports/story/Oceanic-Time-Warners-OCSports-kicks-off-on-Friday/tFuzlZ1n2EyNKh85sF16Jw.cspx and Hawaiian News Now Article.

Fourth, RSNs affiliated with a dominant cable TV operator should not be able to impose a condition requiring an MVPD to market the name brand of the cable TV operator to the MVPD's customers. Such a requirement is anti-competitive because it requires the MVPD to promote the cable TV operator's brand, which will redound to the benefit of the MVPD's dominant competitor, the cable TV operator. Such a requirement would thus appear to violate Section 628(b)'s proscription against unreasonable and unfair acts and practices.

As the *Adelphia Merger* conditions expire, the FCC should be keenly aware of the beneficial effect they have had in promoting nascent MVPD competition in the video marketplace and addressing potential anti-competitive abuses by RSNs. Adding the above-described clarifications and regulations would significantly promote competition in the video marketplace going forward and ensure reasonable rates, terms, and conditions for new-entrant MVPDs.

III. CONCLUSION

For all these reasons, HTSC urges the Commission to keep in place and to clarify the *Adelphia Order* merger conditions as outlined in these comments. The Commission should fulfill the congressional mandate for robust competition in the video marketplace so that consumers can receive the benefits of competition. Once there is sustained and robust competition among MVPDs, there would be no further need for RSN rules. Given that this is not yet the case in the current market environment, there is a continuing need for new MVPD entrants to gain access to “must see” RSN programming with reasonable rates, terms, and conditions.

Respectfully submitted,

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